IN THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE DAVID E. RUSSELL, JUDGE

IN RE: SETH E. SICROFF,
Debtor.

STEPHEN C. JETT,
Plaintiff and Creditor,
vs.
SETH E. SICROFF,
Defendant and Debtor.

Case No. 96-3578-C-7
Adversary No. 97-2277-C

* * * *

THE COURT: Where is Judge Klein's order?

MR. WHALEY: Your Honor, maybe I can clarify for you. My understanding is that we still have a trial date, that my client could actually win. But the purpose of today is to determine whether, because my client had to file bankruptcy, this action is discharged.

THE COURT: Yes.

MR. WHALEY: And the Court looks at it—it's obviously willful. I mean, it's an intentional act. It's "willful and malicious" that has to exist to avoid dischargeability.

And I think what the Court is saying is that I've looked at the totality of circumstances, and it's my position that without even refuting, just looking at the totality of circumstances, it's clear that my client was doing a particular thing. He was complaining to the university about closing the department, and as a result maybe he said inappropriate things about plaintiffs, but it was not done with a malicious idea. If anything, they sued him 12 days after he wrote this letter

and made this into a three-ring circus that has now continued for six years.

And so the single issue is not how much their damages are or what's going to happen. The single issue for you to decide is either he was willful and malicious and, therefore, it is not discharged and we go off back to state court and get to tell 12 jurors about this, or it doesn't reach that level of maliciousness required by bankruptcy court, which is different than our state court definition.

And that's a question of judicial impression. And that's why I'm kind of submitting this. They can put all their documents in, and my position is it's not the level of maliciousness to avoid dischargeability.

THE COURT: So, I take it that neither one of you want to bring up the issue of damages; is that right?

MR. WHALEY: I don't think we need to.

THE COURT: I'm prepared to rule today.

MR. WIENS: Well, your Honor, you asked me where the Court's order is, Exhibit 5 to the motion in limine, Court's order of February 5, 2002.

The reason this is important, because I anticipated this exact issue: do we have to put on our underlying case, I trot out all 15 witnesses that will testify that this came up from professional colleagues, all the things showing the damages to my client, bringing doctors for emotional distress. He specifically said no, only the determination that if you go back to trial and the trial finds that it was willful and malicious, it can't discharged.

And on Paragraph -- if you find Exhibit 5 -

THE COURT: Wait a minute. I've found Exhibit 5.

MR. WIENS: -- order of February 5 -

THE COURT: Yes.

MR. WIENS: -- it says: "Notice of Order for Trial. The trial will be held 2/28 with Judge Russell, 'on dischargeability issue only,'" not on the measure of my client's damages.

THE COURT: Okay.

MR. WIENS: Just if we go to trial and the jury says we find this malicious -- and did like the arbitrator, in fact found punitive damages, that that can't be discharged.

I really feel like I'm sandbagged when I talked to Judge Klein about this --

THE COURT: All right.

MR. WIENS: -- twice, that I did not have to make that evidence

THE COURT: You are correct. The order -- and the order of Judge Klein is quite clear. So the only issue before me now is whether this particular obligation was dischargeable.

MR. WIENS: And not the measure of my client's damages.

THE COURT: And not the measure of your client's damages. You are correct. Mr. Whaley apparently agrees with you.

MR. WIENS: So I think the Court has concurred -- I didn't keep track, but I think four or five times now has concurred that the specific things pointed out were, in fact, slanderous, and by definition untrue if they're slanderous, because if they're true, they're not slanderous. And by the inherent nature of making such accusations, both in written and oral form, it's inherent that those were intentional acts. In fact, Mr. Whaley has acknowledged that they were intentional acts.

THE COURT: That's correct.

MR. WIENS : And, again, maliciousness can be inferred by the fact they weren't true. I cited the California law to that effect. So I --

THE COURT: Well, what about bankruptcy law? Do you have any bankruptcy cases that say that statements such as these that were made are nondischargeable?

MR. WIENS: Well, I cited the code section that says if it's willful and malicious --

THE COURT: That's the problem. That phrase has different connotations in the bankruptcy law. You may be right, I don't know, but I don't have any authority in front me concerning that.

MR. WIENS: I don't -- willful and malicious is willful and malicious. There is no evidence he did these accidentally.

THE COURT: I know. But what you're saying now is that maliciousness is implied. Did Congress intend for that word to be overlooked when someone -- when the Court makes a determination or tries to make a determination as to whether an obligation is dischargeable or not?

There are cases. There was the Ciccini (phonetic) case which held, in effect, as I understood it, that the word "malicious" didn't mean very much. But that case has been criticized and limited, I believe, by subsequent cases of the Ninth Circuit. So I'm not sure in my own mind what the right law is in this regard.

We do know, and I acknowledged, that there have been statements that were libelous. The question is: are those kind of statements, I mean, just by themselves, sufficient to make a nondischargeable judgment. And they may very well be, I simply don't know. I don't have any case authority to examine.

MR. WIENS: Well, I was operating under the assumption, your Honor, that when you're in federal case -- court --

THE COURT: Yes.

MR. WIENS: -- on a state court claim -- this is by law a state tort action, it's not a federal type of action.

THE COURT: Correct.

MR. WIENS: -- the federal court utilizes the state law.

THE COURT: It does what to the state law?

MR. WIENS: Utilizes the state law on a particular state --

THE COURT: Well, it will utilize a state law to a certain extent, I suppose, but the nondischargeability provisions of the code are quite -- they limit -- I mean, their purpose is to limit the type of judgments that can be rendered nondischargeable. And, you know, the language of the code must be -- must be looked to in order to determine whether or not you can even have a state court judgment and -- you know, of law. I don't know if that would be nondischargeable or not. It may be.

MR. WIENS: Well, here's the problem. That's why I think Judge Klein long ago lifted the stay so we could proceed in state court, never anticipating we were going to drag through years of appeals and take this long, because we're putting the cart before the horse. It's the trier of fact that's going to determine whether these are malicious. So, not even letting us essentially -- if you say this is nondischargeable, there is no reason to have a trial. I can go to trial; the state court jury can say malicious; punitive damages; give them a million dollars of punitive damages, and you've already ruled it's dischargeable.

THE COURT: That's right.

MR. WIENS: Now you've got two conflicting opinions.

THE COURT: Not necessarily.

MR. WHALEY: Not at all. There won't be a state court trial if this is -- the whole point here is that we know this is willful, the question is: is it malicious? If it's malicious, then we go on to the next step and try the case in the summertime. If it's not malicious, then the debt is discharged and the state court action goes away, it's all over.

And I think that what I'm saying is, sure, way in the back of my mind I think I can win this case at trial, but I'm saying given all his facts, what really happened here was not malicious. You can have libel and slander, and it's not malicious, and that --

MR. WIENS: Well, that, I haven't seen any authority for that.

MR. WHALEY: That's the issue.

THE COURT: And I haven't seen any contrary authority either. I haven't had any authority from your side or from Mr. Whaley's side.

MR. WHALEY: Right. I've read annotations --

THE COURT: Unfortunately, I've never had a case of libel or slander to deal with in respect to nondischargeability. This is the first case I've had. I've been on the bench for 15 years, and this is the first case I've ever had.

MR. WIENS: And I cited the law that says -- you're never going to get a defendant to get on the stand and admit that he's malicious. You have to infer --

THE COURT: I understand that. But you're saying that it's implied in the law --

MR. WIENS: I am not saying that.

THE COURT: -- and that implication in the law is sufficient to make it a nondischargeable obligation under the Bankruptcy Code. And you may be right. I don't know. So I can either take the matter as --

MR. WIENS: The law is -- says if it's not true there is malice. The mere fact that it's not true; okay?

THE COURT: Yeah.

MR. WIENS: We've proved that.

MR. WHALEY: That's not true at all. That's not true. You can have libel and slander and it's not malicious.

THE COURT: You may be right.

MR. WIENS: I dispute that.

THE COURT: Well --

MR. WIENS: Maybe we can submit --

THE COURT: I would really appreciate it if you would, because --

MR. WIENS: Just on that specific issue.

THE COURT: Just on that specific issue, right. Because I think that from what I've been able to glean is there have been statements that were libelous.

MR. WHALEY: It's undisputed. I mean, at this point, I guess what I'm saying is why don't we give you a little brief, because I'm not -- I am conceding that for purposes of this hearing. I just think the totality of the evidence you received also shows that there was no malicious intent. And it's my understanding that "malicious" as defined by bankruptcy -- it's a bankruptcy definition.

In other words, I've read all kinds of cases, and there is all kinds of specific fraud that, if it occurs, it raises to a level of malicious. And there is some distinction between what the state court calls malicious and what the bankruptcy court calls malicious. I could -- I mean, I ran out of time, but I never did get to a libel or slander case, and —

THE COURT: That's my problem, too.

MR. WHALEY: And, in particular, there may be a particular level or description that occurs in a libel and slander case where they say, yes, this is malicious.

I guess my point in coming here today and saying: "Accept all his facts; I don't think that you've raised to that level of malicious."

THE COURT: Well, I think we have an issue here right in front of us.